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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92056317
Party	Defendant Top Gun Intellectual Properties, LLC
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Date	07/08/2014
Attachments	Top Gun Opposition to Motion to Amend.pdf(258474 bytes )

COCKPIT USA, INC.,	)	Cancellation No.: 92056317
	)	
Petitioner,	)	Registration No.: 2817325
v.	)	Mark: TOP GUN
	)	
TOP GUN INTELLECTUAL	)	
PROPERTIES, INC.,	)	
	)	
Registrant.	)	
	)	

Top Gun Intellectual Properties, Inc. ("Registrant") hereby submits this Opposition to Petitioner Cockpit USA, Inc.'s ("Cockpit" or "Petitioner") Motion for Leave to File an Amended Petition to Cancel.

Because Cockpit's proposed Amended Petition is futile, leave to amend should be denied. Even under the proposed Amended Petition, Cockpit fails to set forth any grounds upon which the proposed additional claims of fraud can be sustained. Specifically, Cockpit fails to allege any factual basis which could support a finding that Registrant was not using the mark on shoes, sandals, sports coats, and jeans at the time that it submitted its Section 8 Declaration, on September 10, 2009, or that it had not used the mark continuously for five years through, September 10, 2009, when it submitted its Section 15 Declaration. Rather, Cockpit pleads instead only that the mark was allegedly not in use in connection with such goods after the Section 8 & 15 Declarations were filed.

Cockpit's proposed claims for fraud with respect to the filing of such declarations therefore fail as a matter of law.

Clearly recognizing the deficiencies of its proposed pleading, Cockpit once again seeks permission from the Board to conduct a fishing expedition in search of fraud claims that it has no reasonable basis for asserting in the first place, and once again improperly attempts to justify the absence of any factual basis for such claims by contending that such facts are peculiarly within the opposing party's knowledge. Accordingly, to grant Cockpit leave to amend under the circumstances herein would be to render the requirements of Rule 11 meaningless.

Additionally, Cockpit's Motion for Leave to Amend should not even be considered by the Board because it does not include the requisite certificate of service. TBMP 113.02.

**Legal Standard Under Rule 15(a)**

Granting of leave to amend a pleading is within the discretion of the Board and is allowed only "when justice so requires." Trek Bicycle Corporation v. Styletrek Limited, 64 U.S.P.Q.2d 1540, 1541 (TTAB 2001), quoting Fed.R.Civ.P. 15(a). A motion to amend pursuant to Rule 15(a) may therefore be denied if the proposed amendment would be futile. Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A., 464 F.3d 1339, 1352 (Fed. Cir. 2006), citing Foman v. Davis, 371 U.S. 178, 182 (1962). Accordingly, "[w]hen a party faces the possibility of being denied leave to amend on the ground of futility, that party must demonstrate that its pleading states a claim on which relief could be granted, and it must proffer sufficient facts supporting the amended pleading that the claim could survive a dispositive pretrial motion." Id., at 1355-56; Themis Capital, LLC

v. Democratic Republic of Congo, 2013 U.S. Dist. LEXIS 56645, \*15-16 (S.D.N.Y. 2013) (a proposed amendment is futile if the amended pleading fails to state a claim upon which relief could be granted, and would thus not survive a motion to dismiss).

To survive a motion to dismiss, the factual allegations in a pleading must be enough to raise a right to relief above the speculative level. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007). Moreover, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009).

#### **Cockpit's Proposed Claims for Fraud Fail as a Matter of Law**

Cockpit seeks to add claims of fraud based on Registrant having allegedly made intentionally false statements regarding its use of the TOP GUN mark on shoes, sandals, sports coats, and jeans, in the Section 8 & 15 Declarations that it filed on September 10, 2009. Findings that the Declarations were, in fact, false are requirements for such claims. In support of the allegations that such Declarations were false, i.e., that Registrant was not using the mark on such goods on September 10, 2009, and that it had not used the mark on such goods continuously for the five years preceding September 10, 2009, Cockpit alleges only that its counsel's investigation revealed that such goods were not being offered for sale on Registrant's website on September 11, 2012 and January 4, 2013, more than three years after the false statements are alleged to have been made. Such allegations are legally insufficient to support Cockpit's proposed claims of fraud.

Even if Cockpit's allegations that the mark was not being used on shoes, sandals, sports coats and jeans on September 11, 2012 and January 4, 2013 are accepted as true for the purposes of this motion, as required, they simply cannot support a finding that the

mark was not in use on such goods on September 10, 2009, as a matter of law. In short, Cockpit does not allege a single fact that could support a reasonable inference by the Board that Registrant's declarations were false, let alone fraudulent. See Caymus Vineyards v. Caymus Medical, Inc., 107 U.S.P.Q.2d 1519 (TTAB 2013) (In order to state a claim upon which relief can be granted, sufficient factual content must be alleged such that, if proved, it would allow the Board to conclude or draw a reasonable inference that a valid ground exists for opposing registration of a mark). Accordingly, without any facts that could support a finding that the declarations were false, Cockpit cannot prevail on its proposed claims that Registrant committed fraud, as a matter of law.

Instead of properly pleading its claims of fraud with particularity, Cockpit invites the Board to speculate that, because the specified goods were allegedly not available on Registrant's website in 2012 and 2013, they therefore were also not available in 2009. Likewise, Cockpit speculates that, because such goods were not available on Registrant's website in 2012 and 2013, they also were not being sold in Registrant's retail stores during those same years, and in 2009, and in the five years preceding 2009. In short, the entire proposed claims are premised on nothing but speculation, which does not permit the Board "to infer more than the mere possibility of misconduct." Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1950.

Indeed, Cockpit's claim is not even plausible. Both the Petition and the proposed Amended Petition recognize that Registrant operated retail stores under the TOP GUN mark before it even began operating the website (Amended Petition ¶10). Given such facts, it is simply implausible to contend that, merely because certain goods were not being sold on the website, they therefore were not being sold at all. See Iqbal, 556 U.S.

662, 129 S.Ct. at 1949-50 (a pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'"), quoting Twombly, 550 U.S. at 570; Caymus, 107 U.S.P.Q. 1519.

Cockpit's failure to allege facts sufficient to support the allegations of nonuse are even more glaring because the proposed claims are for fraud, which are examined under the heightened pleading standard of Rule 9(b). Under Rule 9(b), the pleading must contain an explicit rather than an implied expression of the circumstances constituting the fraud. Asian and Western Classics, 92 U.S.P.Q.2d at 1478, quoting King Automotive, Inc. v. Speedy Muffler King, Inc., 667 F.2d 1008, 212 U.S.P.Q. 801, 903 (CCPA 1981). Cockpit's proposed pleading fails this requirement too.

Specifically, the pleading, at best, merely implies that Registrant was not using the mark on the specified goods when it submitted the allegedly fraudulent declarations in September 2009, based on the allegation that such goods were not available on Registrant's website when it was viewed by Cockpit's counsel in in 2012 and 2013. Likewise, the pleading merely implies, at best, that the specified goods were not being sold at all under the TOP GUN mark, merely because they were not offered on the website in 2012 and 2013, without any explicit reference to Registrant's retail stores.

In sum, there are simply no facts alleged upon which a finding of nonuse, at the relevant time, and thereby a finding of fraud, can be inferred, let alone proven. The proposed claims for fraud are therefore futile.

#### **Cockpit's Cannot Rely on Discovery In the Hope of Curing Its Pleading Deficiencies**

As the Board itself has stated, the purposes of the Rule 9(b) heightened pleading standard include weeding out baseless claims, preventing fishing expeditions and fraud

actions in which all facts are learned after discovery, and serving the goals of Rule 11 Fed. R. Civ. P. Asian and Western Classics B.V. v. Lynne Selkow, 92 U.S.P.Q.2d 1478, 1478-79 (T.T.A.B. 2009), citing Wright & Miller, Federal Practice and Procedure, 5A §1296 N. 11 (2004). Here, not only are the proposed fraud claims completely baseless, but Cockpit essentially admits that it cannot plead a proper claim without first being granted the opportunity to take discovery.

Clearly recognizing that its claims are legally deficient, Cockpit contends that it should be permitted to take discovery because the information as to whether or not the mark was used on the specified goods is information "uniquely in the control of Registrant." In short, Cockpit seeks to conduct a fishing expedition in search of a valid claim. But, [t]he discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not to find out if it has any basis for a claim." Micro Motion, Inc. v. Kane Steel Co., Inc., 894 F.2d 1318, 1327 (Fed. Cir. 1990) (emphasis in original). Here, Cockpit does not plead a viable claim, and it plainly seeks to take discovery in order to find out if there is any basis for the claims it proposes.

Moreover, while Cockpit's counsel may have reviewed Registrant's website in 2012 and 2013, no attempt was made to investigate whether the goods were available for sale in Registrant's retail stores. Thus, for this reason at least, the necessary information is not "peculiarly within the opposing party's knowledge." Rather, it was incumbent upon Cockpit, under both Rule 9(b) and Rule 11, to have undertaken a proper investigation before attempting to plead a claim of fraud. Having failed to do so, Cockpit should not be granted leave to plead a fiction and then utilize the privilege of discovery to learn

whether or not there is any basis for converting the fiction to fact. Accordingly, Cockpit's motion flies in the face of Rule 11 and should be denied.

Finally, while claims of fraud may sometimes be permitted when some of the information needed to prove the claims is solely within the knowledge of the opposing party, such claims cannot proceed when all of the necessary information is alleged to be in the other party's knowledge. In other words, under the aforementioned authority, some factual basis for the claim must first be alleged in order for the pleading to be allowed. Here, Cockpit alleges none.

### **Conclusion**

For the foregoing reasons, Cockpit's proposed claims for fraud are futile, as no facts are alleged that could support such claims as a matter of law. More particularly, no factual basis is alleged for the assertion that the declarations of use under Sections 8 & 15 were false. To the contrary, the claims are pure speculation and Cockpit's Motion for Leave to Amend should therefore be denied.

Dated: July 8, 2014

Respectfully submitted,

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By:

  
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## **CERTIFICATE OF SERVICE**

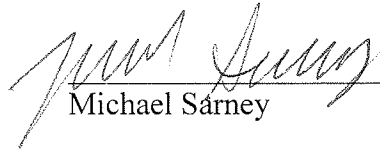
I, the undersigned, Michael Sarney, hereby certified that on the 8<sup>th</sup> day of July, 2014, I caused to be served a true and correct copy of the foregoing

### **REGISTRANT'S OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO FILE AN AMENDED PETITION TO CANCEL**

by e-mail, pursuant to agreement, on:

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